No. 83-1870 (3)

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IN THE

Supreme Court of the United States

October Term, 1983

CONSUMERS UNION OF UNITED STATES, INC.,

Petitioner,

against

THE NEW REGINA CORPORATION and
GREY ADVERTISING, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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Petitioner Consumers Union of

United States, Inc.* respectfully submits this reply brief in support of its petition for a writ of certiorari.

I. This case should be decided in tandem with Harper & Row v. Nation.

The Court's grant of the petition for a writ of certiorari in Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d Cir. 1983), cert. granted, 52 U.S.L.W. 3860 (U.S. May 29, 1984 No. 83-1632), strongly suggests that the instant petition likewise be granted

* Pursuant to Rule 28.1 of the Rules of the Supreme Court, petitioner states that it has no corporate parent and no publicly-owned subsidiaries or affiliates.

and the two cases decided with reference to each other.*

Both Harper & Row and this case raise important, unprecedented issues dealing with the "interplay" of the First Amendment and the fair use doctrine under the copyright statute. The underlying question in both cases is the same: to what extent does the First Amendment require a diminution of copyright protection?

Certiorari should be granted here because this case differs from Harper & Row in several important respects,

* The Court of Appeals below relied on its earlier opinion in Harper & Row to support the decision below. (13a)

including both the nature of the subject matter of the copyrighted work and the purpose and character of the defendants' use. Indeed, whatever the ultimate outcome in Harper & Row, reversal is mandated here because of the Second Circuit's unwarranted application of the commercial speech doctrine to nullify petitioner's copyright.

In Harper & Row, the Court of Appeals held that First Amendment principles of free expression overrode the copyright holder's rights and authorized the copying of a portion of a former President's memoirs by a journalist for use in a political news magazine. The court's decision was grounded on the fact that the material

copied there was plainly at the core of speech deserving full First Amendment protection: "political events of major significance involving a former President of the United States"* 723 F.2d at 204.

The instant case involves neither political speech nor news reporting. Here, another panel of the Second Circuit invoked the "First Amendment commercial speech doctrine" to permit a vacuum

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* The Second Circuit characterized the subject of the copied material as follows: "knowledge so necessary to a democratic state" (723 F.2d at 197); "the very essence of news and of history" (Id. at 204); "concerning important matters of state" (Id. at 208); "vital facts and historical observations about our nation's life"; and "the reporting of information concerning political decisions at the highest level of government" (Id. at 208).

cleaner manufacturer to copy word for word several copyrighted evaluations from CONSUMER REPORTS praising the Regina Powerteam lightweight vacuum cleaner and to use them in paid television advertisements designed solely to persuade viewers to buy the Regina product.

Thus, whether or not this Court rules that Harper & Row was correctly decided, it is respectfully submitted that certiorari should be granted in this case and the decision below reversed. Should this Court rule that the First Amendment values inherent in the political news information copied in Harper & Row are insufficient to negate the copyright holder's rights, it would

seem to follow as an a fortiori proposition that this case too was wrongly decided by the Second Circuit.

Even if this Court were to rule that Harper & Row was properly decided, certiorari should still be granted here and the Court of Appeals reversed because the opinion below improperly elevates constitutional protection for product advertisements. Such an apotheosis of commercial speech at the expense of the rights secured by the copyright statute is inconsistent with this Court's prior decisions and the public interest. See Petition for Writ of Certiorari, pp. 18-32.

II. This matter is ripe for review by the Court.

Respondents erroneously assert that the Court should ignore the merits of the petition and deny it because the issues arise in the context of a preliminary injunction. What respondents fail to note is that the judgment of the Court of Appeals is for all intents and purposes the final judgment in this case.

As is common in copyright litigation, plaintiff's motion for a preliminary injunction was the procedural linchpin upon which the case has been fully determined.

The record is complete. There are no unresolved factual or legal disputes on the copyright issues raised in the petition. These questions were squarely faced and definitively ruled upon by the court below. Indeed, the Court of Appeals' legal analysis of the copyright issues precludes any further fact finding which would affect its holding.

On the significant copyright and First Amendment issues raised by this petition,* the ruling of the Court of

* Respondents' suggestion that the injunction would have been denied even if copyright infringement had been found is in error. Had the Court of Appeals found infringement, under governing law in the Second Circuit, the injunction on copyright grounds would have been sustained as a matter of course even in

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Appeals is absolute and final.

The ruling below is "fundamental to the further conduct of the case." United States v. General Motors Corp., 323 U.S. 373, 377 (1945); Indeed, there may well be no further proceedings below unless the Court of Appeals is reversed. This Court may and should review such a judgment. cf. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) ("finality" under 28 U.S.C. § 1291 is to be given a "practical rather than a

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the absence of a detailed showing of irreparable harm. (51a) The Court of Appeals, in fact, did not consider the irreparable injury question in connection with petitioner's copyright claim but only with the Lanham Act and state law claims which the Court below reached only after finding no copyright infringement.

technical construction"); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

Conclusion

Petitioner respectfully requests that the petition for a writ of certiorari to the Court of Appeals be granted.

Dated: New York, New York
August 31, 1984

Respectfully submitted,

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